Mabati Rolling Mills v Mbatha (Civil Appeal 59 of 2016)
[2023] KEHC 17405 (KLR) (16 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL 59 OF 2016

J WAKIAGA, J

MAY 16, 2023

BETWEEN

MABATI ROLLING MILLS ..... APPELLANT

AND

EUNICE MUTANU MBATHA ..... RESPONDENT

(Being an Appeal from the judgement of the Resident Magistrate Court at Kigumo in CMCC No 125 of 2013 delivered on 28th October 2016)

JUDGMENT

1. This Appeal arises out of the Judgement of Hon AN Ogonda in which she found the Appellant liable at 100% and awarded Kshs 450, 000 for pain and suffering as a result of a road traffic accident which occurred on the August 10, 2012 involving motor vehicles registration numbers KAR xxx wherein the Plaintiff was travelling as a passenger and motor vehicle registration number KBE xxx registered in the name of the Appellant.

2. Being aggrieved by the said determination, the Appellant filed this Appeal and raised the following grounds of Appeal:

    a) The award in damages was excessive, contrary to law and not following the principles related to an award.

    b) The Court did not consider the submissions by the Appellant thereby arriving at the wrong decision

    c) The Court erred in finding the Appellant liable at 100% instead of dismissing the case for want of proof or in the alternative apportioning liability between the Appellant and the Respondent.

Submissions

3. Directions were issued on the disposal of the Appeal by way of Written Submissions. For the Appellant, it was submitted that the trial Court did not consider nor referred to the Appellant's submissions safe for those on quantum and that before the Court draws an inference on liability, there must be acceptable evidence that the accident indeed occurred as was held in the case of *Douglas Odhiambo Apel & another v Telkom Kenya ltd [2014] e KLR*. It was contended that the Respondent did not prove any particulars of negligence and that the only reason the Court gave for finding the Appellant liable was that the same did not call a witness and in support reliance was placed on the case of *Bonham Carter v Hyder Park Hotel Ltd [1948] 64 TR 177* where the Court held that it was not enough to write down particulars, they must prove them.

4. It was submitted that the Court did not follow the principles relating to award of damages as was stated in the case of *Westch & Son's Ltd vs Shepard [1964] AC 326* that comparable injuries should attract comparable awards and that the defendant is not being punished for the accident as was held in *Tayab v kinangu [1982-88] Ikar 90*. It was submitted that having found as a fact that the Respondent suffered soft tissue injuries with transvers fracture of the tibia and fibular, which was not pleaded, the Court therefore formulated its own inquiries and arrived at a wrong assessment of damages.

5. It was submitted that the evidence on record shows that the Plaintiff was not wearing a seat belt and therefore contributed to the injuries which the Court failed to consider in arriving at the holding on liability.

6. On behalf of the Respondent it was submitted that the Respondent being a fare paying passenger could not contribute to the accident and in arriving at the award in damages the Court considered the medical report and that the Appellant had not met the threshold for which an appellate Court can interfere with the award in damages as set out in Kenya Bus Services ltd v Jane Karambu Gituma.

7. This being a first Appeal, the Court is under a duty to re-assess the evidence tendered before the trial Court to come to its own decision thereon though giving allowance to the fact that it did not have the advantage of seeing and hearing the witnesses as was stated in *Selle & another v Associated Motor Boat Co Ltd & Another [1968] EA 123*

8. From the record of the proceedings on September 9, 2016 the trial Court ordered that the cause Appealed against shall be the test case on liability in respect of the accident the subject matter herein and therefore the Respondents submissions that the Appellant has opted not to Appeal on liability in respect of the other suits from the same cause of action is misleading and without any basis in law and fact.

9. It was the Respondent's evidence that's on the August 10, 2012 she was a passenger in a matatu registration number KAR xxx together with her sons who were Plaintiffs in the other two suits which had an accident with the Appellants motor vehicle whose driver was charged and convicted. In cross examination she stated that the Appellant motor vehicle was joining the road from a feeder road and rammed into the motor vehicle she was travelling in into the left side in the middle of the road as a result she sustained fracture of the right leg.

10. PW1 Dr Kimuyu Judith confirmed that the Respondent sustained a fracture of the right tibia/fibula which was well managed and produced the medical report thereon. The Appellant did not call any evidence.

Determination.

11. From the proceedings and submissions herein, the following issues are identified for determination:

    a) Whether the trial Courts determination on liability was wrong.

    b) Whether the Court arrived at a wrong award in damages.

    c) What order should the Court make on this Appeal.

12. The issue of liability is a matter of evidence and from the record of the proceedings as stated herein above, the Appellant did not call any evidence to rebut the Respondent account on how the accident occurred. I have noted that the Appellant's driver was charged and convicted on his own plea of guilt for hitting the motor vehicle Registration number KAR xxx wherein the Respondent was and fined. This being a Civil matter the Respondent was only required to prove her case on a balance of probability. In arriving at the determination on liability the Court was guided by relevant High Court cases of Motex Knitwear Millsamong others and therefore find no fault with her finding of fact on liability.

13. The Appellant's submission that the Court should have apportioned liability between the same and the Respondent has no basis in law. The Respondent was a passenger on the said motor vehicle and the Appellant if needed any contribution should have sued the owner of that motor vehicle as a third party and having failed to do so cannot be hard to say that the Respondent should have been found liable for not wearing seat belt, which devise has no control on the cause of accident save for reducing the impact and injuries. I therefore find no merit on this ground of Appeal which I hereby dismiss.

14. On quantum, an appellate Court will only interfere with the trial Courts find thereon if the Court acted on wrong principles, took into account irrelevant factors or left out relevant factors. Further the Court will interfere if the amount awarded is so inordinately low or so high that it amounts to an erroneous estimate of damages as was stated in *Kemfro Africa Ltd v AM Lubia & Another [1982-88] 1 KAR 727* and as applied by the superior Courts in Kenya.

15. In this matter the evidence before the trial Court was clear on the injuries sustained by the Respondent which were fracture of tibia fibula together with other soft tissue injuries as stated in the medical report produced by PW1. The trial Courts award was supported by two cases wherein the High Court awarded Kshs 400,000 and in respect of similar injuries and therefore the award herein cannot be said to had been inordinately high.

16. The appellate Court is not expected to interfere with an award of damages for love and affection on the basis that the Respondent is not happy with the same and or that if it was the trial Court it would have arrived at a different award. The Appellant's submissions herein have no basis as I have fir the purposes of this judgement looked at the following awards which o find relevant to come to the conclusion that the trial Courts award was with the acceptable range:

    a) *David Mutembei v Maurice Ochieng Odoyo [2019] eKLR* Kshs 800,000

    b) *Daniel Otieno Owino & another v Elizabeth Atieno Owuor [2020] eKLR* Kshs 400,000

    c) *Nahason Nyabaro Nyandega v Peter Nyakweba Omboga [2021] eKLR* Kshs 650,000.

17. From what is stated herein, it follows that the Appeal has no merit which I hereby dismiss both on liability and damages and a firm the trial Court award. The Respondent is entitled to the cost of this Appeal based on the legal principle that unless otherwise stated cost follow the event.

18. And it is ordered.

DATED SIGNED AND DELIVERD AT MURANGA THIS 16TH DAY Of MAY 2023

J. WAKIAGA

JUDGE

In the presence of